In the Supreme Court

OF THE

United States

OCTOBER TERM, 1951

No. 280

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION and INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 16,

Petitioners,

vs.

JUNEAU SPRUCE CORPORATION (a corporation),

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

RICHARD GLADSTEIN,
240 Montgomery Street, San Francisco 4, California,
Counsel for Petitioners.

GLADSTEIN, ANDERSEN & LEONARD,
ALLAN BROTSKY,
240 Montgomery Street, San Francisco 4, California,
Of Counsel.

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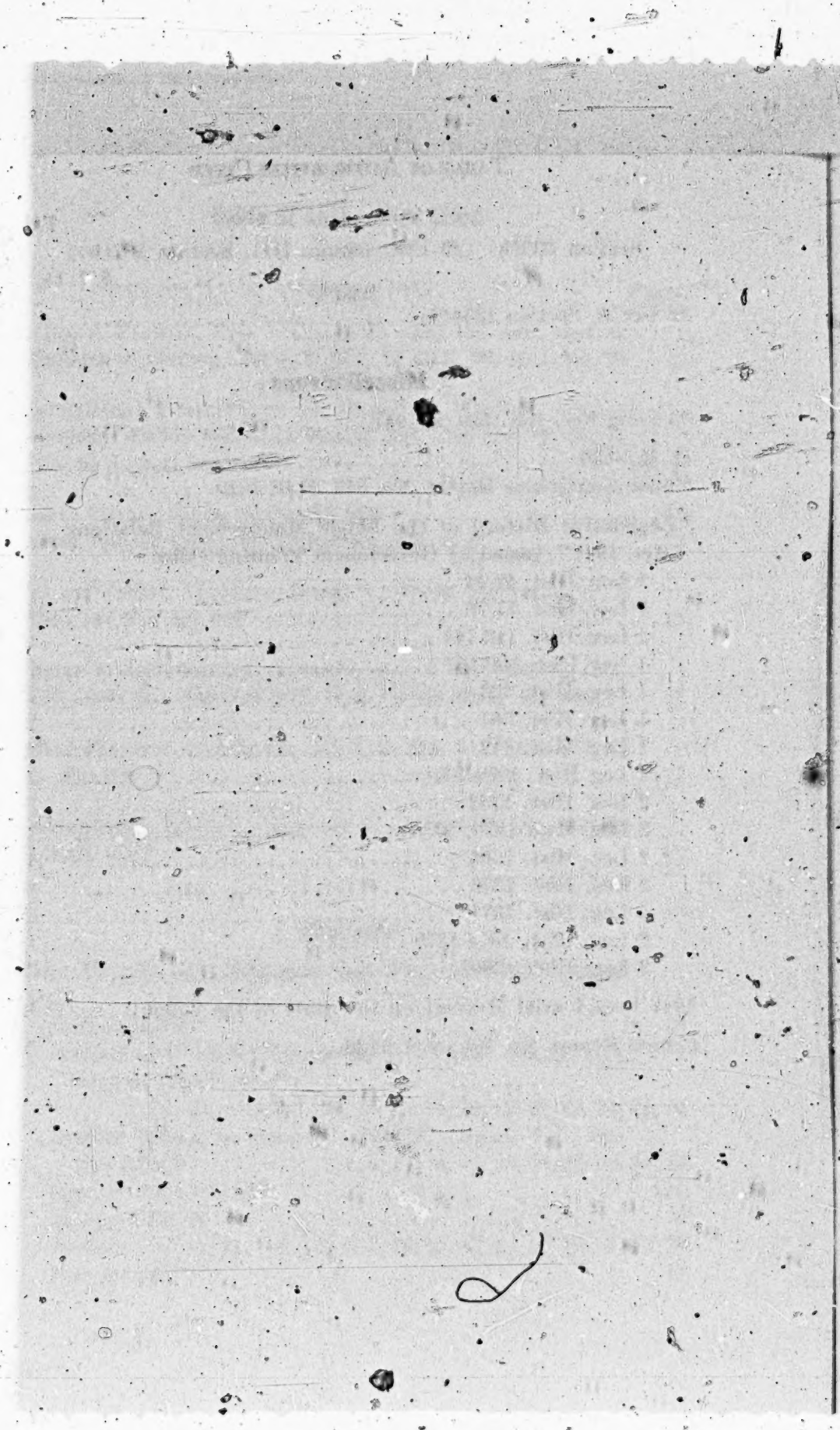

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners International Longshoremen's & Warehousemen's Union (hereafter called the "International") and International Longshoremen's & Warehousemen's Union, Local 16 (hereinafter called "Local 16") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on May 5, 1951, affirming the judgment of the District Court for the Territory of Alaska, Division No. 1, at Juneau (hereinafter sometimes referred to as the "trial court").

OPINIONS BELOW.

The opinion of the District Court for the Territory of Alaska, rendered in ruling upon demurrers and motions of petitioners, is reported at 83 F. Supp. 224. The opinion of the Court of Appeals (R. 1106) is reported at 189 F. (2d) 177.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 5, 1951. (R. 1144.) The order of the Court of Appeals denying petitioners' timely petition for rehearing was entered on June 8, 1951. (R. 1145.)

The jurisdiction of this Court is invoked under 28 USCA §1254(1).

STATUTE INVOLVED.

This case involves what are commonly known as the "jurisdictional dispute" sections of the Labor Management Relations Act, 1947, often referred to as the Taft-Hartley Act, 61 Stat. 136, 29 USC (Supp. III) §151, et seq.[1]

Section 8(b)(4)(D) of the National Labor Relations Act, as amended, 29 USC (Supp. III) §158 (b)(4)(D), and Section 303(a)(4) of the Labor Management Relations Act, 1947, 29 USC (Supp. III) §187(a)(4), contain virtually identical provisions. For ease of reference and comparison, their language is set forth below in parallel columns, with the identical language in each section italicized.

[1]The Labor Management Relations Act, 1947, will sometimes be referred to herein as the "Act". Title 1 thereof, which is the National Labor Relations Act, as amended, will sometimes be referred to herein as the "Labor Relations Act".

Section 8(b)(4)(D)

"Sec. 8 * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents * * *

* * * * *

"(4) *to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is*

* * * * *

"(D) *forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work*

* * *"

Section 303(a)(4)

"Sec. 303 * * *

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization *to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is* * * *

* * * * *

"(4) *forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the* National Labor Relations *Board determining the bargaining representative for employees performing such work*

* * *"

Section 10(k) of the National Labor Relations Act, as amended, 29 USC (Supp. III) §160(k), under which the National Labor Relations Board (hereinafter called the Board) determines which employees in a jurisdictional dispute are entitled to particular work, provides as follows:

"Whenever it is charged that any person has engaged in an unfair labor practice within the

meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Section 303(b) of the Labor Management Relations Act, 1947, 29 USC (Supp. III) §187(b), provides as follows:

"Sec. 303 * * *

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

QUESTIONS PRESENTED.

(1) Whether activities of a labor organization for the object defined by Section 303(a)(4) of the Act[2]

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[2] "* * * forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another

are illegal under that Section, unless they occur after and in the face of a determination by the National Labor Relations Board, under Section 10(k) of the Labor Relations Act, that the employees represented by the labor organization are not entitled to the work in question.

(2) Whether the provisions of Section 8(b)(4)(D) of the Labor Relations Act and Section 303(a)(4) of the Act each proscribe the same conduct on the part of labor organizations; conversely, whether conduct which is not a violation of Section 8(b)(4)(D) of the Labor Relations Act is nevertheless illegal and actionable under Section 303(a)(4) of the Act.

(3) Whether a labor organization, whose claim that the employees it represents are entitled to perform particular work is upheld by the Board in a determination under Section 10(k), can nevertheless be sued for damages for primary activities directed at compelling the employer involved to abide by the Board's award.

STATEMENT OF THE CASE.

Respondent Juneau Spruce Corporation, plaintiff below, sued the International and Local 16, unincorporated trade unions, in the District Court of the Territory of Alaska for one million twenty-five thousand dollars ($1,025,000) in damages, basing its al-

labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work."

leged cause of action on the provisions of Sections 303(a)(4) and 303(b) of the Taft-Hartley Act.

The events out of which the alleged cause of action arose may be briefly summarized as follows:

The respondent came into existence as a corporation and began its lumber manufacturing operations in the spring of 1947, when it acquired the business of Juneau Lumber Mills, Inc. By contract with the latter corporation, the respondent purchased a sawmill and planing mill at Juneau, Alaska, logging equipment at Edna Bay, Alaska, retail yards at Juneau, Anchorage and Fairbanks, Alaska, together with all equipment used in those operations. (R. 113-118.) The operations of the respondent began on May 2, 1947, with the mill employees in Juneau consisting of those formerly employed by Juneau Lumber Mills, Inc. (R. 123, 228.)

At the time of the take-over, the respondent's predecessor was a party to a collective bargaining agreement with Local 16, whereby it had agreed to hire, and was hiring, longshoremen represented by that labor organization to perform all longshore work in connection with its operations. (Def. Exh. C; R. 918-919.) In practice, the work performed under that contract consisted of the loading of lumber aboard the tugs or boats of purchasers at the company's docks in Juneau. (R. 170-171, 232.) For this work the longshoremen were paid by the respondent's predecessor. Lumber which was shipped by commercial steamer was also loaded aboard ship by longshoremen represented by Local 16, who in those instances were

employed directly by the steamship companies. (R. 155.)

These kinds of shipment accounted for but a small proportion of the predecessor's production at the time of the take-over, the greater proportion of production at that time going to the United States Army Engineers, which used its own personnel to pick up its lumber at the company dock. (R. 154-155, 183.) Until September, 1947, the situation with respect to the disposition of production remained the same for respondent as it had for its predecessor. Respondent continued to use longshoremen for the work covered under its predecessor's contract with Local 16 (R. 174-175, 933); the bulk of its production continued to go to the Army Engineers.

In September, 1947, respondent's contract with the Army Engineers was cancelled. (R. 183.) In anticipation of this, and of the necessity for it to dispose of most of its lumber elsewhere, the respondent had leased sea-going barges, to be used in shipping the bulk of its lumber to the United States. (R. 187.) That portion which the respondent had theretofore been shipping to the United States had gone by commercial steamer (R. 157), following the practice of respondent's predecessor, which had never employed its own sea-going barges for that purpose. (R. 982.)

In October, 1947, instead of using longshoremen for the work, the respondent employed its mill employees to place the first load of lumber on this sea-going barge. (R. 185-187.) These employees had never

before loaded lumber aboard sea-going craft for shipment to the United States. (R. 982.) Immediately after the barge was loaded (R. 185), a committee of Local 16 visited the respondent, to request that the longshoremen it represented be given the barge-loading work. (R. 188.) The respondent rejected this request. (R. 189.) A second barge was loaded in the same manner in March, 1948.[3] (R. 202.) Promptly thereafter a delegation from Local 16 appeared before a membership meeting of the International Woodworkers of America, Local M-271 (hereinafter called "Local M-271"), which represented the mill employees under a collective bargaining agreement with the respondent. Their position that longshoremen, rather than the mill employees whom Local M-271 represented, were entitled to perform the work of loading the sea-going barges was explained to those in attendance. (R. 832-836.) After the longshoremen's delegation had left, the Local M-271 meeting voted unanimously as follows:

> "Motion moved and seconded to go on record to not load barges. We figure this work belongs to the longshoremen." (Def. Exh. A; R. 838-839.)

Within the following week, a delegation consisting of representatives of Local M-271 and Local 16 informed Eugene S. Hawkins, Vice-President and General Manager of respondent, that Local M-271 had agreed that the work of loading the barges belonged to the longshoremen. Hawkins was further informed

[3]Such a diversion of work from the Juneau longshoremen caused a reduction of one-third in their income. (R. 621.)

that the members of Local M-271 would honor the picket line which Local 16 intended to place before respondent's mill if the latter persisted in its refusal to permit longshoremen represented by Local 16 to perform the work of loading the barges. (R. 203-206.) Even though the company's cost of operations would not have been materially affected by acceding to the joint request of the two locals (R. 252-253, 256-257, 266), and the respondent had earlier informed the longshoremen that it would accept such an agreement between them (R. 182), the respondent insisted that the work be done by Local M-271. (R. 261.)

A day or two later, on April 9, 1948, Local M-271 called a meeting which was attended by the overwhelming majority of the mill employees (R. 383, 404, 840), again to discuss the question of the longshoremen's right to perform the barge-loading work and Local M-271's position with respect to the impending picket line. The minutes of the previous meeting recognizing the longshoremen's right to perform the work were read and approved and a general discussion ensued. (R. 841.) Those in attendance resolved unanimously to honor Local 16's picket line if it was established. The official minutes of the meeting read as follows:

> "Special meeting, April 9, 1948. Discussion on Conditions Relative to ILWU loading barges. Move made and seconded to take vote on whether to cross picket line—again a unanimous vote to honor picket line of ILWU." (Def. Exh. A; R. 842.)

The following morning Local 16 established a peaceful picket line at the respondent's mill, and the mill employees honored it in accordance with their resolution passed the previous evening. (R. 843.)

On April 10, 1948, the respondent filed an unfair labor practice charge (the disposition of which is discussed hereafter) with the National Labor Relations Board, alleging that Local 16 was violating Section 8(b)(4)(D) of the Labor Relations Act. From April 10 to July 19, 1948, respondent's mill was closed. (R. 310.) During that entire period the respondent refused to negotiate with the unions concerning a settlement of the dispute on terms agreeable to both unions. (R. 781, 891. 991, 1027.) On the contrary, it insisted that Local M-271 perform the work of barge-loading, although that organization continued to maintain that the longshoremen represented by Local 16 were entitled to the work. (R. 323-325.) In May (R. 453) respondent telephoned from its office in Portland to the President of Local M-271 and asked him to come to that city to see the officers and counsel for his International union. Respondent paid the expenses of the trip. (R. 534-535.) After the return of its President from Portland, Local M-271 entered into an agreement with respondent in which that Local agreed:

> "* * * to cross the picket line established by Local 16, ILWU, and claim jurisdiction of all work performed by employees of the Juneau Spruce Corporation according to our contract, also the loading of company-owned or leased barges with company-owned gear * * *" (Pl. Exh. 7.)

The agreement represented the first claim by Local M-271 to the work in dispute and was followed by the resumption of operations on July 19, 1948, although the peaceful picketing of Local 16 continued. (R. 439-440.) Thereafter, another barge was loaded with lumber by mill employees and was shipped from the mill at Juneau to Prince Rupert, British Columbia, on August 27, 1948. The longshoremen at that port refused to unload the barge because of the existence of the dispute between Local 16 and the respondent. (Pl. Exh. 12; R. 619.) The barge was rerouted to Tacoma, Washington, where it was unloaded. (R. 687, 788.) On October 11, 1948, the manufacturing operations at the mill ceased again, through the lack of storage capacity at respondent's mill caused by its inability to have its lumber unloaded at Puget Sound ports. (R. 440, 692-696.) It remained closed until the trial of the action began on April 27, 1949. (R. 411.)

The unfair labor practice charge which the respondent had filed on April 10, 1948, was investigated by the Regional Director of the 19th Region of the Board and dismissed by him, on the ground that no jurisdictional dispute existed within the meaning of Section 8(b)(4)(D), by virtue of his finding that Local M-271 had relinquished its claim to the jobs in question by respecting the picket line of Local 16. This dismissal was appealed by the respondent, and upheld by the Acting General Counsel of the Board on August 4, 1948. A new charge alleging a violation by Local 16 of Section 8(b)(4)(D), based on the resumption of work by the mill employees represented

by Local M-271, was filed by the respondent on August 3, 1948. Pursuant to the provisions of Section 10(k) of the Labor Relations Act, the Board directed a hearing on the question of which employees were entitled to the disputed work. That hearing resulted in a Board determination on April 1, 1949, that the longshoremen represented by Local 16 were not entitled to the barge-loading work.[4] On May 9, 1949, following this adverse determination by the Board, Local 16 discontinued its picketing.[5]

After a trial before a jury, judgment was entered against both petitioners in the sum of $750,000, plus costs and disbursements, including an attorney's fee of $10,000. (R. 73-74.) The trial court permitted damages to be assessed for the picketing which occurred during the period from April 10, 1948, to April 1, 1949. On appeal, the basic question which the Court of Appeals was called upon to decide was whether the picketing of Local 16 during this period, which preceded the Board's determination on April 1, 1949, that the longshoremen represented by Local 16 were not entitled to the disputed work, was actionable under Section 303(a)(4). Petitioners contended[6] that Section 303(a)(4), like Section 8(b)(4)(D), rendered illegal only such picketing by a labor organization as

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[4] *Juneau Spruce Corp.*, 82 NLRB 650.

[5] *Juneau Spruce Corp.*, 90 NLRB No. 233, n. 5.

[6] Relying on the identity of language in Section 303(a)(4) and Section 8(b)(4)(D) (from which the former section was derived), the construction placed upon Section 8(b)(4)(D) by the Board, and the impact of Section 10(k) on both Sections 8(b)(4)(D) and 303(a)(4), as disclosed by the legislative history of the Act.

took place after and in the face of a Board determination under Section 10(k) that the employees whom it represented were not entitled to the work in dispute. Petitioners asserted that the judgment of the trial court was fatally erroneous in having awarded damages for picketing which preceded the adverse award of the Board. The Court of Appeals rejected this position, and affirmed the judgment below.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the Ninth Circuit erred:

(1) In holding that activities of a labor organization for the object defined by Section 303 of the Act are illegal under that section, even though such activities precede a determination by the Board under Section 10(k) that the employees represented by the labor organization are not entitled to the work in question.

(2) In holding that conduct which is lawful under Section 8(b)(4)(D) of the Labor Relations Act is unlawful under Section 303(a)(4) of the Act.[7]

(3) In holding the District Court for the Territory of Alaska to be a "district court of the United States" within the meaning of Section 303(b) of the Act, and thus approving the application by the trial court to the instant case of the rules concerning

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[7]The additional specifications of error which follow are not relied on for the granting of this petition, but are preserved for presentation to the Court if the writ is issued.

agency, jurisdiction, and service of process, which are laid down in Section 301 of the Act.[5]

(4) In approving instructions to the jury which permitted the International and Local 16 to be held jointly liable as co-conspirators for acts committed by the agents of only one of them, without regard to the

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[5]Section 301 provides, in part, as follows:

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Had the Court of Appeals upheld the position of the petitioners that the trial Court was not a "district court of the United States" within the meaning of Section 303(b) of the Act, it would have been required to consider their contention that the trial Court, as "any other court having jurisdiction of the parties" (Section 303(b)) was required to apply the local, in this case the Alaska, law to the issues of jurisdiction, service of process, and the principles of agency to be applied.

necessity for proof of a conspiracy to engage in activities *for an object proscribed by the Act.*[9]

(5) In upholding the trial court's refusal to instruct the jury concerning the respondent's duty under the Act to bargain collectively, which removed respondent's breach of such duty from the consideration of the jury as a defense to the action, or in mitigation of damages.[10]

REASONS FOR GRANTING THE WRIT.

1. A major objective of Congress in enacting the Taft-Hartley Act was to meet the demand generated by public opinion, and enunciated in the 1947 Presidential Message on the State of the Union,[11] for legislation to deal with the problem of jurisdictional disputes. The legislative history of the Act[12] leaves no doubt that the problem created by such disputes were among those uppermost in the minds of the legislators as requiring statutory treatment,[13] where none

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[9]The instructions claimed to be erroneous are given in the Appendix, pp. i to iii.

[10]The instructions requested by petitioners, and refused, are given in the Appendix, pp. iii to vi.

[11]93 Cong. Rec. 136, Jan. 6, 1947.

[12]This history has been compiled by the Board and published in the two-volume "Legislative History of the Labor Management Relations Act, 1947", issued by the Government Printing Office. For ease of reference excerpts from the legislative history cited in this petition will be to this work, in the following form: ..... Leg. Hist, ...

[13]See, for example, the remarks of Senator Ball at 2 Leg. Hist. 1354, 1355; of Senator Smith at 2 Leg. Hist. 1364; of Senator Aiken at 2 Leg. Hist. 1374-1375.

had existed before.[14] As a result, the jurisdictional dispute provisions became a significant part of the new statute.

The instant case concerns this important area of the Taft-Hartley Act. It deals, by necessity, with the question of the basic approach adopted by Congress for the solution of the problems of jurisdictional disputes, as well as with the inter-relation between the functions of the National Labor Relations Board in handling such disputes, and the remedies available to private suitors for violation of the proscriptions of the Act against certain activities in connection with them. As the first federal appellate decision construing the entire statutory scheme on the subject matter,[15] it has decided vital questions concerning the administration of the Act which should be settled by this Court.

The Court of Appeals held that the question of which employees are entitled to disputed work, as that may be determined by the Board in a proceeding under Section 10(k), was immaterial in an action for damages under Section 303(a)(4). It determined that a union which engaged in a primary strike against

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[14]See, for example, *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 819; *National Labor Relations Board v. Gluek Brewing Co.*, 8 Cir., 144 F. (2d) 847.

[15]*Herzog v. Parsons*, App. D.C., 181 F. (2d) 781, cert. den. as *Parsons v. Herzog*, 340 U.S. 810, 71 S.Ct. 37, 95 L.Ed. 20, dealt solely with an aspect of the powers and duties of the Board under Section 10(k) of the Labor Relations Act. *Schatte v. International Alliance, etc.*, 9 Cir., 182 F. (2d) 158, cert. den. 340 U.S. 877, 71 S.Ct. 64, 95 L.Ed. 30, was confined to the problem of the nature of the allegations required to state a cause of action under Section 303(a)(4).

an employer to require him to assign particular work to employees whom it represented was liable for any damages caused, even if the Board had previously determined in a proceeding under Section 10(k) that the employees represented by the striking union were entitled to the work. Such a holding performs a two-fold mischief: (a) it frustrates the Congressional purpose to solve the problems of jurisdictional disputes by resolving them on their merits; (b) it creates irreconcilable conflicts between the Board's administration of Section 8(b)(4)(D) and the application by the courts of Section 303(a)(4).

(a) The treatment which the respective houses of Congress gave jurisdictional disputes in the bills which originated in each was vitally disparate. H. R. 3020, the House version of the legislation, outlawed entirely concerted action by labor organizations arising out of jurisdictional disputes.[16] The Senate, how-

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[16]This was accomplished by the provisions of Secs. 2(15) and 12(a)(3)(A).

Section 2(15) provided as follows:

"The term 'jurisdictional strike' means a strike against an employer, or other concerted interference with an employer's operations, an object of which is to require that particular work be assigned to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." (1 Leg. Hist. 42-43.)

Section 12(a)(3)(A) provided as follows:

"The following activities, when affecting commerce, shall be unlawful concerted activities: • • •

"(3) Calling, authorizing, engaging in, or assisting——

"(A) any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises." (1 Leg. Hist. 77-78.)

ever, adopted a different approach. Recognizing that jurisdictional disputes were in a special category and that experience had shown that obstructions to commerce arising from them could best be removed not by outlawing them completely but by a fair adjustment of them, the Senate provided for such an adjustment in its bill, S. 1126. Thus, when the Senate bill was reported to the Senate by its Committee on Labor and Education, it was made clear that Sec. 10(k) of that bill had been derived from the bill originally introduced by Senator Morse to deal with jurisdictional disputes.[17]

Sections 8(b)(4)(D) and 10(k) of S. 1126 provided as follows:

Sec. 8(b)(4)(D): "It shall be an unfair labor practice for a labor organization or its agents

* * *

* * * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities

[17] Senator Morse stated:

"I am very happy that on March 10, in a speech which I am sure my colleagues at the time thought was too long, I laid the foundation for my proposals for amendments to the Wagner Act. At that time I offered S. 858, containing the specific proposals which I recommended in that speech insofar as the Wagner Act was concerned. I am very pleased that in the bill which we are reporting today practically all of the provisions of S. 858 are contained in it plus some refinements of S. 858 which I have developed on the issues since my speech on March 10, 1947." (2 Leg. Hist. 1000-1001.)

S. 858 provided that jurisdictional disputes be dealt with by arbitration.

or to perform any services in the course of their employment * * * (D) for the purpose of forcing or requiring any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work tasks * * *" (1 Leg. Hist. 112-114.)

Sec. 10(k): "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or the arbitrator appointed by the Board *or upon such voluntary adjustment of the dispute,* such charge shall be dismissed. The award of an arbitrator shall be deemed a final order of the Board." (Italics supplied.) (1 Leg. Hist. 130-131.)

Senate Report No. 105 on S. 1126 explained these sections as follows:

"Jurisdictional disputes that constitute unfair labor practices within the meaning of section 8(b)(4)(D) may be heard by the Board or an

arbitrator unless within 10 days the parties satisfy the Board that *they have adjusted the dispute or agreed to methods for adjusting it.* If the parties comply with the determination of the Board or the arbitrator appointed by it, *or voluntarily adjust the dispute,* the Board shall dismiss the charge. Finally, the award of the arbitrator is given the same status and force as a final order of the Board, a provision which will avoid the necessity of the Board hearing the dispute if it has designated an arbitrator for that purpose and also will permit the Board to seek enforcement of the award without further proceedings." (Italics supplied.) (1 Leg. Hist. 433.)

When the conference of the two houses had met, considered the differing versions of the bills they had initially passed, and then reported to their respective houses the bill which subsequently became the Act, House Conference Report No. 510 on H.R. 3020 had this to say with respect to the version finally adopted:

"The Senate amendment also contained a new section 10(k), which had no counterpart in the House bill. This section would empower and direct the Board to hear and determine disputes between unions giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes). The conference agreement contains this provision of the Senate amendment, amended to omit the authority to appoint an arbitrator. If the employer's employees select as their bargaining agent the organization that the Board determines has jurisdiction, and if the Board certifies that union, the employer will, of course, be under the statutory duty to bargain with it." (1 Leg. Hist. 561.)

This legislative history establishes that the view of the Senate concerning the best method with which to deal with jurisdictional disputes prevailed, and that the bill as finally enacted embodied a basic distinction between such disputes and secondary boycotts, concerning which no procedure analogous to that of Sec. 10(k) was included. The emphasis with respect to jurisdictional disputes was on a settlement of the dispute on its merits. Should the parties themselves fail to settle the dispute, the determination of the dispute was left with the Board. It was only when the parties to the dispute failed to comply with the determination of the Board that concerted activities of labor organizations in connection with such a dispute were to become unfair under the provisions of Section 8(b)(4)(D), and actionable under Section 303(a)(4).

(b) The Board has recognized this congressional purpose in its construction of Sections 10(k) and 8(b)(4)(D). Thus, it has held that a strike by a labor organization for the object defined by Section 8(b)(4)(D), which occurs before a Board determination of the dispute under Section 10(k), does not constitute a violation of the former section. It is only when such activities take place in the face of a determination under Section 10(k) which is adverse to the union engaging in them that the section is violated.[18]

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[18] *Westinghouse Electric Corporation*, 94 NLRB No. 63, 28 LRRM 1058.

Earlier in the same case, the Board had issued a 10(k) determination adverse to the labor organizations involved, against which 8(b)(4)(D) charges had been filed. (83 NLRB 477.) A hearing then took place on the question of whether the respondent unions

As has been indicated, the rule laid down by the Court of Appeals concerning the meaning of Section 303(a)(4) is squarely to the contrary. As a result, a union, whose claim that the employees it represents are entitled to perform particular work is upheld by the Board in a determination under Section 10(k), can nevertheless be sued for damages for primary activities directed at compelling the employer to abide by the Board's award.[19]

The view of the statute adopted by the Court of Appeals thus removes the only effective assurance that employers will abide by awards of the Board resolving jurisdictional disputes on their merits. It

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had committed the unfair labor practice defined in Section 8(b)(4)(D). Based on that hearing, which did not consider events following the Board's 10(k) determination, the Trial Examiner found that Section 8(b)(4)(D) had been violated. The Board remanded the case to the Trial Examiner, stating in the course of its order:

> "The Respondents contended, inter alia, that they had complied with the Board's 10(k) determination in this case. No evidence with respect to such compliance or noncompliance was adduced at the hearing before the Trial Examiner.
>
> "We are of the opinion that the intent of Congress was that the General Counsel should allege and prove noncompliance with our 10(k) determination in 8(b)(4)(D) proceedings. Accordingly, we shall reopen the record in this case, and remand it to the Trial Examiner to give the General Counsel an opportunity to amend his pleadings and to introduce evidence to sustain his burden of proof." (Footnotes omitted.)

Thereafter, following an additional hearing, the Trial Examiner again found that the respondent unions had violated Section 8(b)(4)(D), basing his finding on a strike called by the union *before* the Board's 10(k) determination had been made. In reversing the Trial Examiner's finding the Board said:

> "Clearly, the strike *before* the determination cannot prove noncompliance with the determination."

There being no evidence that the strike had continued after the 10(k) determination, the Board dismissed the complaint.

[19] Under the Labor Relations Act, no provision is made for direct enforcement by the Board through the Courts of Appeals of its Section 10(k) awards.

makes the decisions of the Board under 10(k) binding on unions, but only advisory as to employers, and hence defeats the object of Congress to make the Board's determination under that Section binding upon all of the parties to the dispute.

That Congress did not intend such results to flow from Section 303(a)(4) is manifest. The Section was not created to nullify the results to be achieved by the Board under Section 10(k). It was designed to implement the remedies available to employers against unions which persisted in seeking particular work for employees they represented *after an adverse Board determination under Section 10(k)*. Conversely, it could hardly have been intended to create a cause of action on behalf of employers who themselves refused to abide by the Board determination under Section 10(k).

From the foregoing, it is apparent that this case raises questions not only concerning the meaning of Section 303(a)(4), but also raises important questions concerning the administration of the Labor Relations Act which should be settled by this Court. It is only in reviewing an action under Section 303(a)(4) that the questions of the inter-relation of that section with Sections 8(b)(4)(D) and 10(k) can be adequately considered and determined.

2. The decision of the Court of Appeals appears to conflict with the principle laid down by this Court in *International Brotherhood of Electrical Workers, etc. v. National Labor Relations Board*, 341 U.S. 694, 71 S. Ct. 954, 95 L. Ed. 793, that identical language

in Sections 8(b)(4) and 303 is entitled to the same meaning in both Sections.[20] The Court of Appeals gives the language of Section 303(a)(4), which is derived from and identical with Section 8(b)(4)(D), a meaning different from that which the Board, and proper construction, places on the latter Section. In doing so it ignores the intention of Congress in adding Section 303[21] to give employers a "cause of action to recover any damages caused by the activities made unfair by Section 8(b)(4)."[22]

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[20]71 S.Ct. 954, at 959; 95 L.Ed. 793, at 798.

[21]The Section was added to the Senate version of the bill during debate. See 2 Leg. Hist. 1370.

[22]Quoted from the remarks of Representative Lesinski. (1 Leg. Hist. 912.) The following additional excerpts from the legislative history demonstrate that the provisions of Section 303 were intended merely to create an additional sanction in favor of employers for the activities proscribed by Section 8(b)(4):

"Mr. Pepper. Mr. President, I had assumed that the Ball amendment and the Taft amendment had both, in defining the boycott or the jurisdictional strike, employed substantially the same language as is used in section 8 of the bill, where those things are made an unfair labor practice. It just dawned on me that the Senator has made it unlawful—not an unfair labor practice, but he has made it unlawful to engage in a boycott or in a jurisdictional strike. * * *

"* * * was it the desire of the Senator from Ohio to make those acts unlawful?

"Mr. Taft. That is correct. *I may say that the definition is exactly the same as the definition we had of an unfair labor practice.* The effect of making it unlawful is simply that a suit for damages can be brought for that kind of thing. There is no criminal penalty of any sort." (Emphasis added.) (2 Leg. Hist. 1371.)

* * * * * * *

"Mr. Pepper. * * *

"In addition to that, the Senator from Ohio proposes to make the basis of a substantive suit at law for damages what the bill in its principal capacity describes as an unfair labor practice. * * *" (2 Leg. Hist. 1390.)

* * * * * * *

"Mr. Ball. I am sorry; if the Senator from Michigan will read subsection (1) of section 10 of the committee bill, on

CONCLUSION.

The decision of the Court of Appeals presents serious problems affecting the administration of the Taft-Hartley law. If permitted to stand it will open the way to further conflicts between determinations of the Board in Section 10(k) and Section 8(b)(4)(D) proceedings and ruling of the courts in Section 303(a)(4) suits. Uncertainty and difficulties in labor relations can and undoubtedly will result from such conflicts. A determination by this court is necessary to clarify the situation presented by the judgment below.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
August 17, 1951.

Respectfully submitted,
RICHARD GLADSTEIN,
Counsel for Petitioners.

GLADSTEIN, ANDERSEN & LEONARD,
ALLAN BROTSKY,
Of Counsel.

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page 33, he will find that no hearing is required. There is simply an investigation by a regional attorney. In any event, *we are defining very clearly, in this amendment and in the pending bill, secondary boycotts and jurisdictional strikes and the definition is the same.* We are defining clearly what we want to make unlawful. * * *" (Emphasis added.) (2 Leg. Hist. 1352.)

(Appendix Follows.)

Appendix.

Appendix

Instructions Nos. 6 and 7, which petitioners claim were erroneous, read as follows:

"6. If you find from a preponderance of the evidence that during the period stated the defendants, acting separately or jointly, engaged in or induced or encouraged plaintiff's employees at Juneau, Alaska, to engage in a concerted refusal in the course of their employment to manufacture, process, transport or otherwise handle or work on any lumber, or to perform any services for the plaintiff, and that the object thereof was to force or require the plaintiff to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons to whom such work had been assigned, and that such acts directly and proximately caused pecuniary loss to the plaintiff, your verdict should be for the plaintiff in such amount as you find it has been damaged, not exceeding in any event the amount sued for. On the other hand, if you do not so find, your verdict should be for the defendants.

"In this connection you are instructed that, if you find from a preponderance of the evidence that the defendants, through their officers or agents acting within the scope of their employment, entered into a conspiracy or understanding to commit the aforesaid acts or any of them for the object or purpose stated, or acted jointly or in pursuance of a common purpose or design, then from the time of entering into such a conspiracy or understanding everything that was

done, said or written by any of the officers or agents of either in furtherance of such conspiracy or understanding and to effect the object or purpose thereof, regardless of whether done, said or written in Alaska or elsewhere, is binding on both of the defendants just as though they themselves, through their officers or agents, had done such acts or made such statements, and if the object of the conspiracy was accomplished, resulting in damage, each is liable for the whole thereof regardless of the degree of participation in the commission of the acts charged, or any of them.

"A conspiracy, common purpose or design may be proved by direct evidence or by proof of such circumstances as naturally tend to prove it and which are sufficient in themselves to satisfy an ordinary prudent person of the existence thereof. Therefore, it is not necessary that such a combination or understanding be shown to be in writing. It is sufficient if the evidence shows a combination of or cooperation between two or more persons to accomplish a common purpose.

"On the other hand, if you find that the defendants did not act in concert or in pursuance of a common purpose or design, you will consider the case against each defendant separately, and you may find either or both or neither of them liable." (R. 51-53)

"7. You are instructed that two or more persons or organizations may participate in a wrong although they do so in different ways, at different times and in unequal proportions. One may plan and the other may be the actual instrument in accomplishing the mischief, but the legal blame will rest upon both as

joint actors. Accordingly, one who directs, advises, encourages, procures, instigates, promotes, aids or abets a wrongful act by another is as responsible therefor as the one who commits the act, so as to impose liability upon such person to the same extent as if he had performed the act himself." (R. 53)

Instructions Nos. 1, 2, 12 and 13, offered by petitioners and refused, read as follows:

"1. You are instructed that it is the public policy of the United States that—

"Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of the Labor Management Relations Act of 1947, oftentimes called the 'Taft-Hartley Act', in order to promote the full flow of commerce, to prescribe legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to de-

fine and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." (R. 34-35)

"2. The Taft-Hartley Act was enacted in the interests of public policy to avoid economic strife and warfare, and so if you find from a consideration of all the evidence in this case that the action of the Juneau Spruce Corporation in refusing to accede to the demand of IWA M-271 to turn over the loading of barges to Local 16 was unreasonable or unjustifiable, in view of that provision, plaintiff is not entitled to recover any damage it may have sustained on account of such unreasonable or unjustifiable refusal to bargain.

"This policy is applicable only to the territorial limits of the United States and not to Canada." (R. 35-36)

"12. You are instructed that section 201 of the Taft-Hartley Act proides as follows:

"That it is the policy of the United States that:

"'(a) Sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of the employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

"'(b) The settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for settlement of disputes; and

"'(c) Certain controversies which arise between parties to collective bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreement provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies." (R. 43-44)

"13. Section 204 of the Taft-Hartley Act provides as follows:

"'In order to prevent or minimize interruptions of the free flow of commerce growing out of labor dis-

putes, employers and employees and their representatives, in any industry affecting commerce, shall:

"'(1) Exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provisions for adequate notice of any proposed change in the terms of such agreement;

"'(2) Whenever a dispute arises over the terms or application of a collective bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously;

"'(3) In case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this act for the purpose of aiding in a settlement of the dispute.'" (R. 44)